No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As explained in the Petition, this is the rare case in which certiorari is warranted in the absence of a circuit conflict. Because of broad language in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941)—language that exceeds the question presented or the reasoning of the case—courts of appeals feel compelled to adopt an erroneous and contorted interpretation of clear statutory text. This is also an unusual case because the Brief in Opposition confirms that this is so. Because circuit courts unanimously view their countertextual interpretation of 28 U.S.C. § 1453(b) as *required* by this Court's decision in *Shamrock Oil*, only this Court can restore Congress's intended meaning to the removal provision of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4.

I. Only This Court Can Correct Circuit Courts' Erroneous Interpretation Of *Shamrock Oil*.

A. In *Shamrock Oil*, the "question for decision" was one of "statutory construction": whether the general removal provision then in effect allowed an original plaintiff in a state-court action to remove the action on diversity grounds based on a counterclaim filed by the original defendant. 313 U.S. at 103, 104. The Court examined the text of the operative statute, which authorized removal "by the defendant or defendants" when other requirements were satisfied. *Id.* at 104 & n.1 (quoting 28 U.S.C. § 71 (1940)). The general removal statute previously in effect permitted removal by "either party, or any one or more of the plaintiffs or defendants." *Id.* at 106 (quoting Act of Mar. 3, 1875, ch. 137, § 3, 18 Stat. 470, 471). Congress's deliberate decision to change that so that only "the

defendant or defendants" could remove a case, the Court reasoned, indicated that an original state-court plaintiff could not remove when faced with a counterclaim. *Id.* at 106-108. That textual interpretation, the Court explained, reflected that Congress intended: (1) "to narrow the federal jurisdiction on removal," *id.* at 107; (2) to "require [a state-court] plaintiff to abide his selection of a forum," *id.* at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1886)); and (3) to treat all plaintiffs alike rather than permitting some, but not others, to remove a case, *id.* at 108. The Court therefore held that the phrase "the defendant or defendants" did not include an original plaintiff subject to a counterclaim.

None of those reasons applies to this case, which involves a different statute and a removal-seeking party in an entirely different position. Petitioner Home Depot's only role is as a defendant to respondent Jackson's state-court class-action counterclaim; Home Depot is not and has never been a plaintiff in this case. Home Depot also does not rely on a general removal provision, instead invoking a removal statute specifically directed at state-court class actions. Those differences are critical—and Home Depot is not challenging the original plaintiff rule as articulated in *Shamrock Oil*. First, unlike the general removal provision currently in effect, which mirrors the text of the statute at issue in *Shamrock Oil*, 28 U.S.C. § 1441(a) (permitting "the defendant or the defendants" to remove), CAFA authorizes "*any* defendant" to remove a qualifying case, 28 U.S.C. § 1453(b) (emphasis added). By deliberately choosing the expansive modifier "any" rather than the restrictive modifier "the," Congress created a *broader* class of parties entitled to remove.

Second, while the Congress that enacted the provision at issue in *Shamrock Oil* intended to narrow removal jurisdiction, the Congress that enacted CAFA intended the opposite. *See Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). Third, even if the Congress that enacted CAFA had intended to require a state-court plaintiff to abide by its choice of forum, that interest would not be implicated by Home Depot's removal—because Home Depot was dragged into state court involuntarily as an original defendant to a class-action counterclaim. Finally, Home Depot's removal does not require Congress or courts to distinguish between plaintiffs who are entitled to remove and plaintiffs who are not—because Home Depot is not a plaintiff.

The statutory holding and reasoning of *Shamrock Oil* therefore do not apply here, where an original defendant to a state-court class-action counterclaim seeks to remove the class action pursuant to CAFA. But circuit courts unanimously hold otherwise—not based on the text or purposes of CAFA but based on overly broad language in *Shamrock Oil*.

Although the statutory phrase at issue in *Shamrock Oil* was "the defendant or defendants," the Court suggested several times that it was interpreting the term "defendant" rather than the more limited phrase "the defendant." 313 U.S. at 105, 107. Taking seriously this Court's admonitions that lower courts must follow the letter of this Court's decisions, circuit courts have felt constrained to interpret "defendant," when used in removal provisions, to conform to this Court's interpretation of "the defendant" in *Shamrock Oil*. Courts have thus held that "defendant," when used in Section 1441(a), cannot include a newly added

defendant to a counterclaim. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to [added counterclaim defendants.]").

In addition, every circuit court to consider the question presented here has relied on this Court's supposed definition of "defendant" to hold that a newly added defendant to a class-action counterclaim may not remove the class action under CAFA because *Shamrock Oil* dictates that such a defendant is not "any defendant" under CAFA, 28 U.S.C. § 1453(b). *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex v. Contreras*, 644 F.3d 799, 804-805 (9th Cir. 2011); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.). Those counter-textual holdings are plainly incorrect—but because they are based on a long-time misunderstanding of the scope of *Shamrock Oil*, "only the Supreme Court can now rectify" that pervasive contortion of clear statutory text. *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc).

B. Remarkably, Jackson's Brief in Opposition confirms this state of play. Jackson agrees that circuit courts view *Shamrock Oil* as setting in stone a definition of "defendant" for all present and future removal provisions. And yet, Jackson does not even attempt to ground that broad view of *Shamrock Oil* in the language or reasoning of that decision—a glaring omission that reinforces Home Depot's view that the broad language circuit courts rely on does not accurately reflect the scope of *Shamrock Oil*'s holding.

Jackson's contention (BIO 13) that the unanimity among lower courts reflects their independent "construction of CAFA" rather than their application of broad language in *Shamrock Oil* is belied by the rest of his brief, which confirms that lower courts view *Shamrock Oil* as establishing the meaning of "defendant" in all removal statutes, rather than as construing the meaning of the phrase "the defendant or defendants." *See, e.g.*, BIO 5, 9, 11, 15, 16, 18-19. Jackson's implication (BIO 13) that circuit courts can simply decline to apply what even Jackson views as this Court's *definition* of "defendant" in *Shamrock Oil* is therefore disingenuous.

As the Petition disclosed (Pet. 9), circuit courts agree on the answer to the question presented. But, as Jackson's Brief in Opposition confirms, that agreement is based on adherence to overly broad language in a decision of this Court rather than on the text, structure, or purpose of CAFA. Because only this Court can correct the circuit courts' errant course, the Court should grant the Petition. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1310 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that the Court granted certiorari "despite the absence of a circuit conflict" to clarify the meaning of the Court's own precedents).

II. Circuit Courts Have Adopted A Counter-Textual Interpretation Of CAFA.

Jackson's textual arguments about Section 1453(b) do not hold water. Each reduces to the argument that *Shamrock Oil*'s supposed definition of "defendant" controls this statutory provision that was enacted 64 years later and uses the word "defendant" in

a different way. That strongly indicates both that Jackson's statutory argument is wrong and that this Court's intervention is necessary to restore Section 1453(b)'s plain meaning.

Home Depot's statutory argument is simple: "any defendant" means any defendant—or at least any party that is *only* a defendant. Jackson's contention (BIO 21) that Home Depot "[l]ack[s] support for its position in the statutory language" is laughable. The statutory language at issue—"any defendant"—could scarcely be clearer. The word "any" means "one or some indiscriminately of whatever kind," *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); the word "defendant" means "[a] person sued in a civil proceeding," *Black's Law Dictionary* 508 (10th ed. 2014). Home Depot is "any defendant" and was entitled to remove Jackson's class-action claims against it. Far from inviting "this Court to rewrite the statute" (BIO 26), Home Depot asks the Court to confirm that the statute means what it says. Although Jackson acknowledges (BIO 20-21) that "any" is an "expansive" word, he nevertheless argues that "any defendant" in Section 1453(b) cannot mean what it says—because "any" cannot "expand the category to which it applies" and in Jackson's view, this Court narrowly defined "defendant" in *Shamrock Oil*. That is the same reasoning employed by the circuit courts, and only this Court can set the record straight.

Home Depot agrees with Jackson (*see* BIO 14) that the question presented is one of statutory construction and congressional intent. And Congress could not have chosen broader—or clearer—language to express its view that *any* defendant to qualifying class-action

claims can remove those claims to federal court. Even Jackson's merits argument to the contrary confirms the need for this Court's immediate intervention. Jackson contends (BIO 18-19) that Home Depot argues "that the language of CAFA supports an expanded definition of 'defendant.'" That is simultaneously untrue and a perfect illustration of why only this Court can correct the erroneous course lower courts feel bound to follow. Home Depot argues for an ordinary and commonsense definition of "defendant"—the same one that is used in the Federal Rules and throughout other federal statutes. Home Depot also argues for a commonsense interpretation of the phrase "any defendant"—one that adheres to this Court's admonitions that the word "any" is expansive. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). The only way to view Home Depot's plain-text argument as seeking "an expanded definition of 'defendant'" is to view *Shamrock Oil* as establishing the meaning of "defendant" for all removal statutes from that moment forward. And that *is* how circuit courts view *Shamrock Oil*, which is precisely why this Court should step in now to clarify that *Shamrock Oil*'s holding is limited to the phrase "the defendant or defendants."

Jackson suggests (BIO 11) the ordinary meaning of "defendant" in CAFA "does not extend to 'counterclaim defendants,' 'third party defendants,' or 'additional counter-defendants.'" Home Depot, of course, is none of those. Jackson simultaneously acknowledges (BIO 16) this Court's holding in *Mississippi ex rel. Hood v. AU Optronics Corp.*, that when Congress used "plaintiffs" in CAFA, it intended the term to have its ordinary meaning as used in the Federal Rules of Civil

Procedure. 571 U.S. 161, 169-170 (2014). There is no reason "defendant" in CAFA's removal provision should be given any different treatment—and the Rules plainly consider an original defendant to a counterclaim to be a "defendant." *See, e.g.*, Fed. R. Civ. P. 12. Jackson and the circuit courts have contorted the term "defendant" to exclude parties who are obviously defendants—because, they say, such a contortion is required by *Shamrock Oil*.

Jackson also relies on the maxim that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" BIO 15 (quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 590 (2010)) (alteration in original). He points out (*ibid.*) that in the decades between the decision in *Shamrock Oil* and the enactment of CAFA, circuit courts construed the general removal provision in Section 1441(a) not to authorize removal by a counterclaim defendant—and argues (BIO 15-16) that Congress must have intended to incorporate that understanding into CAFA's removal provision. That is incorrect. That maxim has no application here because the phrase "any defendant" has no settled judicial understanding. The cases Jackson relies on, like *Shamrock Oil* itself, interpreted statutory language that is *different* from the language at issue in this case. Section 1441(a) uses the phrase "the defendant or the defendants," which is the same phrase (with the addition of one "the") the Court construed in *Shamrock Oil*. But nothing suggests that Congress intended to incorpo-

rate a judicial understanding of *that* phrase when it used a *different* phrase in CAFA.

Jackson's reliance on 28 U.S.C. § 1446 is also unavailing. Section 1453(b) instructs that "[a] class action may be removed to a district court of the United States in accordance with section 1446." Jackson argues (BIO 16) that the incorporation of Section 1446's procedures would not work if the phrase "any defendant" were given its ordinary meaning. That is incorrect. Jackson argues (*ibid.*) that Section 1446 "echoes" Section 1441 when it uses the phrase "[a] defendant"—but that phrase does not appear anywhere in the relevant provision of Section 1441, which instead uses the phrase "the defendant or the defendants." 28 U.S.C. § 1441(a). Unlike Sections 1441(a) and 1453(b), Section 1446 does not define, expand, or restrict the category of defendants entitled to remove. Section 1446 simply establishes the procedures under which a qualifying defendant can remove. Section 1453(b) establishes which defendants can remove a class action ("any defendant"); Section 1441(a) establishes which defendants can remove a qualifying civil action ("the defendant or the defendants"); and Section 1446 provides the mechanism for removal by "[a] defendant or defendants desiring to remove any civil action from a State court," 28 U.S.C. § 1446(a). If either Section 1453(b) or Section 1441(a) empowers a defendant to remove a case, it must follow the procedures in Section 1446(a). The scheme could hardly be *more* "[]coherent" (*contra* BIO 16).

Finally, Jackson correctly states (BIO 17) that, in enacting CAFA, Congress supplanted the requirement of unanimity among defendants as a prerequisite to removal. But Jackson repeats the mistake of the

Fourth Circuit, *see* Pet. App. 7a, in arguing (BIO 19-20) that Congress used the word "any" to modify "defendant" for the sole purpose of eliminating the unanimous-consent rule—even though Congress accomplished that goal by stating that a defendant can remove an eligible class action "without the consent of all defendants." 28 U.S.C. § 1453(b). Because "[a]n ordinary speaker of English who wanted to convey" that any defendant, including an original defendant to a counterclaim, may remove a class action "would do so just the way Congress did," (BIO 20), Section 1453(b) should be given its ordinary meaning.

III. The Question Presented Is Important And Recurring.

As explained in the Petition (Pet. 22-25) and in the three supporting *amicus* briefs, the question presented is important and recurring. The circuit courts' countertextual interpretation of CAFA's removal provision has created a roadmap for circumventing CAFA's goal of ensuring that defendants in qualifying class actions may defend themselves in federal court.

Jackson does not meaningfully contest that lower courts' *Shamrock-Oil*-inspired reading of Section 1453(b) creates a loophole in CAFA's protections. If Jackson had asserted non-class-action claims against Home Depot, Home Depot could not have removed. But Jackson and his attorneys instead hijacked Citibank's effort to collect on Jackson's unpaid credit card bill as an opportunity to assert class-action claims against Home Depot (which was not a party to the collection dispute), betting that the Fourth Circuit's decision in *Palisades*, *supra*, would keep the class action in state court. That is not what Congress intended.

Jackson argues (BIO 25-26) that most collection actions do not spawn class-action counterclaims. That is true—but that is not a response to the point that lower courts' counter-textual interpretation of Section 1453(b) has created a roadmap for class-action lawyers to elude CAFA's removal provisions. The point is not that every collection action will spawn a class-action counterclaim; the point is that class-action lawyers can easily create a situation in which they can file otherwise removable class-action claims and feel confident they will remain in state court. That sort of gamesmanship by lawyers is precisely what CAFA was intended to combat. *See, e.g.*, S. Rep. No. 109-14, at 4 (2005).

Jackson's suggestion (BIO 2) that defendants like Home Depot should "take their complaint to Congress" also misses the mark. Congress *has already acted* to ensure that "any defendant" can remove a qualifying state-court class action. 28 U.S.C. § 1453(b). But lower courts are ignoring that plain text based on "a false [statutory] premise of this Court's own creation." *South Dakota v. Wayfair, Inc.*, No. 17-494 (U.S. June 21, 2018), slip op. 18. Because "[i]t is currently the Court, and not Congress, that is limiting" the scope of removal jurisdiction, *ibid.*, this Court should step in to clarify the proper scope of *Shamrock Oil*.

Finally, Jackson's passing suggestion (BIO 28) that this case is a poor vehicle for resolving the question presented because Jackson has raised other issues that might support a remand to state court should be rejected. Congress directed that such issues should be decided by a federal court when it authorized removal by "any defendant." 28 U.S.C. § 1453(b). That cannot happen unless this Court intervenes.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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